MILAN AUTO SDN. BHD.

v.

WONG SEH YEN

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. ANUAR BIN DATO' HJ. ZAINAL ABIDIN CJ (MALAYA)
TAN SRI DATO' HJ. MOHD AZMI BIN DATO' HJ. KAMARUDDIN FCJ
DATUK WIRA WAN YAHYA BIN PAWAN TEH FCJ
[CIVIL APPEAL NO. 02-154 OF 1994]
10 NOVEMBER 1995

INDUSTRIAL RELATIONS: *Dismissal - Reference under s. 20 Industrial Relations Act 1967 - Proper functions of Industrial Court - Employer alleging misconduct by employee - Failure to decide merits of allegation - Whether a jurisdictional error.*

INDUSTRIAL RELATIONS: *Dismissal - Failure to hold domestic inquiry - Whether dismissal must necessarily be without just cause and excuse - Whether defect curable by inquiry before Industrial Court - Industrial Relations Act 1967 s. 20.*

INTERPRETATION: *Section 143(1) Employment Act 1955 - Requirement of due inquiry before dismissal - Whether could change the policy of the law in s. 20 Industrial Relations Act 1967.*

The appellant company had dismissed the respondent from its employ for alleged disciplinary reasons. The company did not conduct any inquiry into the alleged indiscipline but had informed the latter of the grounds of his dismissal. Pursuant to a reference made to it by the Minister under s. 20 Industrial Relations Act 1967, the Industrial Court took the stand that, such being the circumstances, it was unnecessary for it to examine the evidence and determine whether the company's allegations against the respondent were in fact established, or whether such misconduct if established constituted "a just cause or excuse" for the dismissal. The Court also concluded that it was sufficient to dispose of the dispute purely on account of the company's failure, not only to comply with the principle of natural justice but also with the statutory requirement of "due inquiry" before dismissal under s. 14(1) of the Employment Act 1955. The Court, in consequence, ruled that the dismissal herein was without just cause and excuse. Following an application for *certiorari* by the appellant, the High Court ruled that no jurisdictional error had been committed by the Industrial Court, and hence, affirmed the award. The appellant appealed and before the Federal Court, the main issues that arose were:

1. Whether upon a reference under s. 20 Industrial Relations Act 1967, the Industrial Court was duty bound to examine the evidence adduced and decide on the merits of the dismissal.

2. Whether, in dismissal cases, the initial defect in natural justice in not holding a domestic inquiry could be cured by an inquiry held before the Industrial Court.

3. Whether the requirement of "due inquiry" before dismissal stipulated by s. 14(1) of the Employment Act 1955 could in any way affect or change the policy of the law expounded by s. 20 of the Industrial Relations Act 1967.

Held:

Per Mohd Azmi bin Kamaruddin FCJ (delivering the judgment of the Court):

[1] The function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold. It has to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits is a jurisdictional error that merits interference by the High Court by way of *certiorari*. Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of reference by substituting its own reason, that is to say a reason not relied upon by the employer for the dismissal.

[2] The initial defect in natural justice in not holding a statutory or contractual domestic inquiry is "curable" by the inquiry held by the Industrial Court itself. Industrial Court could not therefore shy away from determining the two issues required to be determined in dismissal cases under s. 20 reference. In omitting to carry out its basic functions, the Industrial Court in the present appeal had clearly committed a jurisdictional error. It follows that the learned High Court Judge, in dismissing the appellant's application, had fallen into similar error.

[3] The requirement of due inquiry before dismissal by s. 14(1) of the Employment Act for employees whose earning did not exceed RM1,250 per month, could not by mere inference change the policy of the law in s. 20 of the Industrial Relations Act. There is no basis in law to hold that the defect in natural justice could only be cured if the workman earned more than RM1,250 per month. The principle of curability should not be limited to certain category of workmen depending on their salary.

[4] In the absence of clear words by Parliament, the Court must hold that none of the Amending Acts to the Employment Act 1955 *viz.* Act A 91/1971, Act A 360/1976, and Act A 497/1980, was intended to alter the policy of the law under the Industrial Relations Act 1967.

[Appeal allowed. Award of Industrial Court quashed. Reference remitted to another division of the Industrial Court].

*[**Bahasa Malaysia** Translation of Headnotes]*

PERHUBUNGAN PERINDUSTRIAN: *Pemberhentian - Rujukan di bawah s. 20 Akta Perhubungan Perindustrian - Fungsi sebenar Mahkamah Perindustrian - Majikan mendakwa salah-laku oleh pekerja - Kegagalan untuk memutuskan merit pendakwaan - Samada suatu kesilapan bidangkuasa.*

PERHUBUNGAN PERINDUSTRIAN: *Pemberhentian - Kegagalan untuk mengemukakan siasatan domestik - Samada pemberhentian menjadi pemberhentian yang tidak mempunyai alasan dan sebab-sebab yang adil - Samada kecacatan boleh dipulihkan melalui siasatan di hadapan Mahkamah Perindustrian - Akta Perhubungan Perindustrian 1967 s. 20.*

PENTAFSIRAN: *Seksyen 143(1) Akta Pekerjaan 1955 - Keperluan siasatan sebelum pemberhentian - Samada boleh menukar polisi undang-undang dalam s. 20 Akta Perhubungan Perindustrian 1967.*

Syarikat perayu telah memberhentikan responden daripada perkhidmatannya atas alasan-alasan tindakan tatatertib. Syarikat tersebut tidak melakukan apa-apa siasatan terhadap ketiadaan tatatertib yang dikatakan itu tetapi telah memaklumkannya kepada responden mengenai alasan-alasan pemberhentiannya. Ekoran dengan satu rujukan yang dibuat

kepadanya oleh Menteri di bawah s. 20 Akta Perhubungan Perindustrian 1967, Mahkamah Perindustrian telah mengambil sikap bahawa, oleh kerana begitulah keadaannya adalah dengan itu tidak perlu bagi Mahkamah memeriksa keterangan dan menentukan samada pengataan syarikat terhadap responden telah dibuktikan, atau bahawa salah-laku yang sedemikian, jika dibuktikan, akan menjadikan pembuangan tersebut dibuat dengan alasan atau sebab-sebab yang adil. Mahkamah juga memutuskan bahawa ianya adalah memadai untuk menyelesaikan pertikaian tersebut semata-mata atas alasan kegagalan syarikat, bukan sahaja untuk mematuhi prinsip keadilan asasi, tetapi juga kerana gagal mematuhi kehendak-kehendak berkanun mengenai "due inquiry" (siasatan yang wajar) sebelum pemberhentian di bawah s. 14(1) Akta Pekerjaan 1955. Mahkamah, akibatnya, memutuskan bahawa pemberhentian di sini adalah tanpa alasan dan sebab-sebab yang adil. Berikutan dengan satu permohonan *certiorari* oleh perayu, Mahkamah Tinggi memutuskan bahawa tidak terdapat kesilapan bidangkuasa dilakukan oleh Mahkamah Perindustrian dan dengan itu telah mengikrarkan award tersebut. Perayu merayu dan di hadapan Mahkamah Persekutuan isu-isu utama yang berbangkit adalah:

1. Samada atas rujukan di bawah s. 20 Akta Perhubungan Perindustrian 1967 Mahkamah Perindustrian terikat oleh kewajipan untuk memeriksa keterangan yang dikemukakan dan memutuskan atas merit mengenai pemberhentian tersebut.

2. Samada, dalam kes-kes pemberhentian, kecacatan awal dalam keadilan asasi kerana tidak mengadakan siasatan domestik boleh dipulihkan oleh siasatan yang dibuat di hadapan Mahkamah Perindustrian.

3. Samada kehendak "due inquiry" sebelum pemberhentian seperti yang ditetapkan oleh s. 14(1) Akta Pekerjaan 1955 boleh menjejaskan atau menukar dasar undang-undang yang dihuraikan oleh s. 20 Akta Perhubungan Perindustrian 1967.

Diputuskan:

Oleh Mohd Azmi bin Kamarudddin HMP (menyampaikan penghakiman Mahkamah):
[1] Peranan Mahkamah Perindustrian, dalam kes pemberhentian atas rujukan di bawah s. 20 adalah dua hala. Ianya haruslah menentukan samada salah-laku yang dilakukan oleh pekerja tersebut telah dibuktikan dan kedua, samada salahlaku yang terbukti itu boleh menjadi alasan-alasan atau sebab-sebab yang adil untuk pemberhentian tersebut. Kegagalan untuk menentukan isu-isu ini atas merit adalah merupakan kesilapan bidangkuasa membolehkan campurtangan Mahkamah Tinggi melalui *certiorari*. Selanjutnya, Mahkamah Perindustrian akan bertindak di luar bidangkuasa jika ia menukar bidang rujukan dengan menggantikan alasannya yang tersendiri, iaitu alasan yang tidak diberikan oleh majikan sebagai alasan pemberhentian tersebut.

[2] Kecacatan awal dalam keadilan asasi kerana tidak mengemukakan siasatan berkanun atau kontraktual adalah "curable" melalui siasatan yang diadakan oleh Mahkamah Perindustrian itu sendiri. Mahkamah Perindustrian dengan itu tidak boleh mengelakkan diri daripada memeriksa kedua-dua isu yang perlu ditentukan dalam kes-kes pemberhentian di bawah rujukan s. 20. Dengan meninggalkan peranan asasnya, Mahkamah Perindustrian dalam rayuan semasa telah dengan jelasnya melakukan kesilapan bidangkuasa. Ianya mengikut bahawa Hakim Mahkamah Tinggi yang bijaksana dalam menolak permohonan perayu, telah melakukan kesilapan yang sama.

[3] Keperluan mengadakan siasatan yang wajar sebelum pemberhentian melalui s. 14(1) Akta Pekerjaan bagi pekerja-pekerja yang pendapatannya tidak melebihi RM1,250 sebulan, tidak boleh, melalui inferens semata-mata, menukar dasar undang-undang dalam s. 20 Akta

Perhubungan Perindustrian. Tidak terdapat asas di sisi undang-undang untuk memutuskan bahawa kecacatan dalam keadilan asasi boleh dipulihkan hanya jika pekerja tersebut mempunyai pendapatan yang melebihi RM1,250 sebulan. Prinsip pemulihan tidak seharusnya dihadkan kepada kategori pekerja yang tertentu sahaja bergantung pada gaji mereka.

[4] Dalam ketiadaan perkataan-perkataan yang jelas oleh Parlimen, Mahkamah haruslah memutuskan bahawa tidak satu pun Akta-Akta Pindaan kepada Akta Pekerjaan 1955 iaitu Akta A 91/1971, Akta A 360/1976, dan Akta A 497/1980, adalah diniatkan untuk mengubah polisi undang-undang di bawah Akta Perhubungan Perindustrian, 1967.

[Rayuan dibenarkan. Award Mahkamah Perindustrian dibatalkan. Rujukan dikemukakan kepada bahagian lain Mahkamah Perindustrian].

Cases referred to:

Syarikat Great Eastern Life Assurance Bhd. v. Kesatuan Sekerja Kebangsaan Pekerja-Pekerja Perdagangan (Award No. 21/69) ***(refd)***

Workmen of the Motipur Sugar Factory Private Ltd. v. The Motipur Sugar Factory Private Ltd AIR [1965] SC 1803 ***(refd)***

Dreamland Corporation (M) Sdn. Bhd. v. Chong Chin Sooi & Anor. [1988] 1 MLJ 111 ***(refd)***

Calvin v. Carr & Others [1979] 2 All. ER ***(refd)***

Hong Leong Assurance Sdn. Bhd. v. Wong Yuen Hock [1995] 2 MLJ 753 ***(foll)***

Legislation referred to:

Employment Act 1955, ss. 2, 14(1)
Industrial Relations Act, 1967, s. 20

For the appellant - Balbinder Kaur; M/s. Chua Brothers, Azzat & Izzat
For the respondent - R. Sivarasa; M/s. Sivarasa & Associates

JUDGMENT

Mohd Azmi bin Kamaruddin FCJ:

We allowed this appeal on 19 June 1995, and we now give our reasons.

The appeal of Milan Auto Sdn. Bhd. was against the decision of the High Court dated 22 February 1994 in dismissing the appellant's application to quash the award of the Industrial Court No. 116 of 1992 pursuant to a reference made by the Minister of Human Resources under s. 20(3) of the Industrial Relations Act, 1967 following representation by Encik Wong Seh Yen (the respondent/claimant), a mechanic with a monthly salary of RM600 who considered himself to have been dismissed without just cause or excuse by the appellant on 31 March 1990.

The grounds for the claimant's dismissal, as contained in the company's letter of 31 March 1990 reads:

> Mr. Wong Seh Yen
>
> **Re: Termination of Service**
>
> We refer to the above captioned subject and regret to inform you that your service is hereby terminated immediately.
>
> We have been informed by your immediate superior, service manager, Mr. Yew Sin Nam, that your attitude towards the company's working policy in very unbecoming. On three occasions you have been caught sleeping during office hour by the parts director and

operations manager. You have taken leave without approval from your immediate superior. When you were ask to see the management with regards to the mentioned, you were very arrogant and refuse to see the operations manager.

After numerous warnings were given to you both in writing and verbal, you continue to be indisciplined, unproductive, arrogant and refuse to work properly when instructions were given to you by your department manager.

In view of the aforesaid, we have no choice but to terminate your service with immediate effect. Please note that your 2nd half month salary will be withheld for Income Tax clearance and a ceasation form will be given to you. You are also to return the overall clothing which was supplied to you by the company and to be handed to your department manager. Failing to do so, we will deduct the amount involved from your salary.

Yours faithfully,

Milan Auto (M) Sdn. Bhd.

signed

Hamid bin Sulaiman
Executive Director

There were thus, three main incidents advanced by Milan Auto for the alleged indiscipline, unproductivity and arrogance on the part of the claimant which according to the company merited the dismissal:

(i) Wong was caught sleeping on three occasions during office hours;

(ii) he took leave without approval; and

(ii) On each of the above incidents, he refused to see the operations manager, when requested to do so.

In its award, the Industrial Court merely took note of the alleged grounds for the dismissal without making any decision on the merits. Relying on an earlier Award No. 21/69 in the case of *Syarikat Great Eastern Life Assurance Bhd. v. Kesatuan Sekerja Kebangsaan Pekerja-Pekerja Perdagangan*, it in effect concluded that it was unnecessary for the Court to examine the evidence and determine whether the company's allegations against the claimant were in fact established, or to consider whether such misconduct if established constituted "a just cause or excuse" for the dismissal, and that it was sufficient to dispose of the dispute purely on account of the company's failure to comply not only with the principle of natural justice but also with the statutory requirement of "due inquiry" before dismissal under s. 14(1) of the Employment Act. This is clearly reflected at pages 4 to 7 of the award, which for the sake of convenience is now reproduced:

Before we examine the evidence whether the reasons for dismissing as given in CL2 have been made out, it would be pertinent to examine first as to the requirement of the law before a workman can be dismissed. It has been stated in Award No. 21/69 in the case of *Syarikat Great Eastern Life Assurance Bhd v. Kesatuan Sekerja Kebangsaan Pekerja-Pekerja Perdagangan*:

> Before the service of an employee can be terminated on the grounds that he has committed some misconduct which deserves the punishment of dismissal, he should adequately informed of the accusation made against him and he should be given a fair opportunity to correct or contradict them. One of the principles of natural justice is that no one shall be condemned unheard, and in the words of Lord Denning in *Surinder Singh Kanda v. Federation of Malaya* [1962] MLJ 169, if the right to be heard is to be a real right which is worth anything, it must carry with it a right in

the accused person to know the case which is made against him. The accused must be given sufficient opportunity not only to know the case against him but also to answer it.

Section 14(1) of the Employment Act says:

An employee may, on the grounds of misconduct inconsistent with fulfillment of the express or implied conditions of his service, after due inquiry:

(a) dismiss without notice the employee,

(b) downgrade the employee; or

(c) impose any other lesser punishment as he deems just and fit.

In other words an employee can only be dismissed without notice for misconduct after due inquiry. As such for an "employee" as defined under s. 2 of the Act, an inquiry is a must before he can be dismissed.

The evidence shows that there was no inquiry held as required under s. 14(l) of the Employment Act 1955. There is also no evidence that claimant was asked to give his explanation as to the alleged misconduct. What happened was that on 28 February 1990, claimant was alleged to have been found sleeping in the mechanics' rest room just after his lunch break. On 1 March 1990, COW4, the service manager wrote a warning letter, CO3 to the claimant and this was copied to the executive director, COW1. One month later that is, on 31 March 1990, the company issued CL2 - terminating claimant's services to take effect immediately.

In this case the company has failed not only to follow the rules of natural justice that is, to afford an opportunity for claimant to be heard but also failed to comply with the statutory requirement as stated under s. 14(l) of the Employment Act, 1955.

To my mind failure to comply with s. 14(l) of the Employment Act, 1955 cannot be saved by the principle in *Workmen of the Motipur Sugar Factory Private Ltd. v. The Motipur Sugar Factory Private Ltd* AIR [1965] SC 1803 as adopted by the Supreme Court in *Dreamland Corporation (M) Sdn. Bhd. v. Chong Chin Sooi & Anor.* [1988] 1 MLJ 111 which states:

> When an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal. It will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the Tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out.

This is because in the *Dreamland* case it involved a claimant whose salary per month was RM2,400 and therefore not an "employee" within the meaning of the Employment Act, 1955. Therefore the principle in the *Dreamland* case cannot be applicable in all cases as it cannot override the statutory requirement of s. 14(l) of the Employment Act, 1955.

As such it is the finding of this Court that the dismissal is invalid and therefore for the purpose of s. 20 of the Industrial Relations Act, 1967, the dismissal is without just cause or excuse.

In the context of s. 20 reference, we disagreed with the above argument. For one thing, *Surinder Singh Kanda* is not a dispute under the Industrial Relations Act, and for another the case of *Syarikat Great Eastern Life Assurance Bhd.* is not a binding authority. As

pointed out by this Court recently in *Hong Leong Assurance Sdn. Bhd. v. Wong Yuen Hock* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by *certiorari* by the High Court. Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of the reference by substituting its own reason, that is to say a reason not relied upon by the employer for the dismissal. For the reasons given in *Hong Leong Assurance*, we were of the view that the initial defect in natural justice in not holding a statutory or contractual domestic inquiry was "curable" by the inquiry held by the Industrial Court itself on the principle laid down in *Workmen of the Motipur Factory Private Ltd. v. The Motipur Sugar Factory Private Ltd.* AIR [1965] SC 1803; *Calvin v. Carr & Others* [1979] 2 AER and *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 MLJ 111.

We had considered the distinction sought to be made by the Industrial Court between *Dreamland* and the present case. It was brought in argument that the claimant in this case was an "employee" under s. 14(1) Employment Act as he was employed as a mechanic at a monthly salary of RM600 as compared to the salary of RM2,400 per month earned by the manager in *Dreamland*. It was thus argued that unlike the present case, "due inquiry" was not required in *Dreamland*. As pointed out in *Hong Leong Assurance* case, the requirement of due inquiry before dismissal by s. 14(1) of the Employment Act for employees whose earning did not exceed one thousand two hundred and fifty ringgit per month could not by mere inference change the policy of the law in s. 20 of the Industrial Relations Act. Further, there would be no basis in law for holding that the defect in natural justice could only be cured, if the workman earned more than RM1,250 per month. As such, we could not accept that the principle of curability should be limited only to certain category of workmen depending on their salary. In the absence of clear words by Parliament, we held the view that none of the Amending Acts to the Employment Act 1955 *viz* Act A 91/1971, Act A 360/1976, and Act A 497/1980, was intended to alter the policy of the law under the Industrial Relations Act 1967. The Industrial Court could not therefore shy away or excuse itself from determining the two issues required to be determined in dismissal cases under s. 20 reference. In our view, the Industrial Court had in the present appeal committed jurisdictional error in omitting to carry out its basic functions.

The learned High Court Judge, in dismissing the company's application fell into similar error as the Industrial Court in holding that the claimant was dismissed without just cause or excuse purely on the ground of breach of natural justice and failure to hold a statutory or contractual domestic inquiry, without assessing the evidence and determining the real issues required to be determined by the Minister's reference.

In the circumstances of this case, we quashed the award and remitted the reference to another division of the Industrial Court to determine the dismissal dispute according to law. We also made no order as to costs.